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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 469.

TEXAS AND NEW ORLEANS RAILROAD COMPANY ET AL.,
Petitioners,
vs.
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ETC., ET AL.,
Respondents.

REPLY BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY ET AL., PETITIONERS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In view of the fact that counsel for respondents have incorporated into their brief Congressional Committee Reports and other matter not put in evidence in the trial court, and that a number of statements on fact issues are made in their brief which if left unchallenged might be considered admitted by petitioners, it is considered necessary to file this short reply brief confined to such matters.

On page 79 of their brief respondents quote from the Report of the House Committee which considered the Act here involved, and emphasize the statement that "There are also legal obligations which would be accepted by and imposed upon the parties by the proposed law * * *". If such matter is to be considered by this Court, we respectfully submit that the "legal obligations" referred to are those contained in Section 10 of the Act, forbidding any change by either party after the appointment of an emergency board by the President, and for thirty days thereafter, as is plainly shown by the concluding paragraphs found on page 5 of the Report. The Report of the Senate Committee which considered the Bill (Cal. No. 615, Senate Report No. 606, 69th Cong., 1st Session) plainly shows the manner in which the Bill was submitted, and the lack of any Congressional intent to compel either party to submit to the machinery of the Act until a national emergency has arisen. In that Report it is said:

> "The question was consequently presented whether the substitute should consist of a compulsory system with adequate means provided for its enforcement, or whether it was in the public interest to create the machinery for amicable adjustment of labor disputes agreed upon by the parties and to the success of which both parties were committed.
>
> Manifestly, it is unwise to commingle the two. One plan or the other should be adopted."

This, we submit, gives added emphasis to the arguments and references found on pages 64-76 of petitioners' main brief and effectively refutes respondents' contrary assertions. One of counsel for respondents, who represented the unions in sponsoring the Bill, now

quotes himself as authority for his present interpretation of the Act, and then makes the extraordinary assertion that at the time he was "speaking for both carriers and employees * * *." This we categorically deny, and deny further that the representative of the railroads, Mr. Thom, was even present when such statements were made. No one other than Mr. Richberg made any such statements with reference to the preliminary steps provided in the Act. The intent of Congress is plain from the proceedings and history—the Act of 1920 had not been satisfactory, and when both parties presented to Congress a Bill agreeable to both of them Congress passed it on the theory that the Government should give the parties a chance to work out their difficulties through such machinery set up and financed by the Government. Mr. Richberg's personal interpretation of the agreed Bill can certainly not bind the other parties joining in its preparation and submission.

We feel called upon also to refute the assumption which underlies plaintiffs' whole brief, *i. e.*, the national union, and it alone, is representative of *all* the employees on petitioners' lines, and that no sane laboring man could possibly become a member of a so-called "company union" in the absence of coercion or intimidation exerted upon him. The term "company union" is one applied generally by national unions to any type of local association of employees formed for the purpose of dealing with the employer and unaffiliated with any national organization. The movement away from national unions and toward local autonomous organizations functioning only in the industry of one employer has been marked during the past ten or twelve years, (Burton, *Employee Represen-*

tation. Baltimore, 1926, pp. 27-32). As early as 1926, some 1,400,000 laborers were members of such unions (Dunn, *Company Unions.* New York, 1927, p. 8) and their desirability and effectiveness in the railroad industry was forcibly pointed out by the late Chief Justice Taft. His words are to be found on page 75 of Bulletin No. 303 of the United States Bureau of Labor Statistics (often referred to in respondents' brief), and are as follows:

> "The present administration, by forcing the Adamson law through, and by its subsequent administration of the railways, enthroned the national leaders of the railway labor organizations in power. The framing, execution, and construction of labor provisions and regulations in the railroad administration were largely intrusted to labor leaders, and there was no active interest really adverse to that of the labor organizations in the Government operation. During the war such a condition had to be endured, but now the situation is different. The railroad executives, restored to possession of the properties and responsible for their efficient and economic management, are seeking a readjustment and a basis for operating the properties in which much-needed discipline and a fairly proportionate rate of wages may be restored and maintained. They propose that each company shall be permitted to deal collectively with the men in its employ and shall not be required to deal in the first instance with the national heads of labor organizations. This is a real collective bargaining. The principle is that the employer and a body of his employees shall come as near together as possible in their conferences, so that looking into each other's eyes and hearing each other's voices, so to speak, they may have a clear understanding, each of the other's position and condition. The primary unit of action is the

shop or railroad system in which the dispute arises. This has never been denied until now by either side.

"Experience has shown that with full liberty to deal with their respective employees by themselves, many railway executives can fully and satisfactorily adjust working conditions, and wages, too. In such matters, local self-government is the essence of collective bargaining and not a straw should be put in the way of it."

The assumption that the so-called "company union" is always the mere creature of the employer has been denied even by those most friendly to national unions. One such friend has recently pointed out that large numbers of workers have in the past few years become dissatisfied with representation by national organizations, and have organized and become members of local associations because of the studied conviction that they could get more from the employer through such organizations than through the national ones (Wm. M. Lieserson in XIII Proceedings of American Academy of Political Science, No. 1, page 96). This writer has also pointed out that the remedy of the national organizations is to make effective efforts to offer the worker more than can the local associations rather than to confine themselves to mere vituperation such as characterizes respondents' brief herein.

A number of statements, purporting to be of fact, contained in Respondents' brief are contrary to the record. It is believed that the following are of sufficient moment to require correction.

1. Respondents deny that the suit grows out of or involves a dispute between the two labor organizations—the Brotherhood and the Association. Yet in their original bill they made Ehlinger, Derrington and Mc-

Daniel, officers and members of the Association, parties defendant (R. 7-8), and sought to have them enjoined from further organizing or promoting the Association (R. 44). It was only after relief against these men had been denied (R. 83-84) that they were omitted as defendants in the amended bill (R. 314-315).

2. They deny that the Brotherhood is a national organization or a branch or department of it, controlled, as Petitioners assert, from afar. It is submitted that these statements are refuted by their constitution (R. 988-1017).

3. They assert that the Association was created by the Railroad Company or through its influence at about the time of the appearance of the Federal mediator; that it is in effect the *alter ego* of the Company. These assertions are refuted by the evidence which is summarized, with appropriate references to the record, on pages 20 to 25, and 27 and 28, of Petitioners' original brief. Respondents admit in their brief (p. 43) that in 1924 the Association was sufficiently active to oppose the Howell-Barkley bill. While this is wholly outside the record, it happens to be true.

4. Respondents say, at page 129 of their brief: "There is no proof whatever in the record to substantiate the 'surmises' * * * that members of the Brotherhood engaged in activities in its behalf on the company's time and pay." In reply, we quote from the record: "With respect to interviewing clerks during office hours: this has also been frequently done by officers of the Brotherhood of Railway Clerks, particularly by General Chairman, H. W. Harper" (R. 434). Harper was still interviewing clerks during their office hours as late as November, 1927 (R. 793).

5. They attempt to make much of an extract from

the testimony of G. S. Waid, one of Petitioners (their brief p. 128), who was called as a witness by them, but they suppress the fact that he had been sick, and so absent from duty and most of the time from the State from July 1st to September 15, 1927, the very time when the events referred to were taking place (R. 518).

6. They say that the Chairman of the Association as such asked for instructions from Torian, an officer of the Railroad. The letters referred to (R. 785-791), as we read them, contain no requests for instructions. They evidence merely anxiety that the officer of the Railroad shall know of the growing membership of the Association, and of the difficulties which it is overcoming,—a very natural anxiety in view of the long and theretofore unsuccessful struggle of the Association for recognition.

7. Throughout their brief they constantly say that the record teems with evidence of coercion and of violation of the injunction, but when it comes to *facts* they refer (their brief pp. 129-130 and 150-152) only to the acts which are set out in detail in Petitioners' brief, which Petitioners believe and here submit were and are entirely lawful. Were there anything else, surely the respondents would have pointed it out instead of dealing in generalities.

8. Finally Respondents say that petitioners have never seriously contested the sufficiency of the evidence taken on the final hearing, at which "something over five hundred pages of additional testimony" were adduced. This is the exact opposite of the fact. We have most seriously contended and do most seriously contend that none of the things done constituted or could constitute a violation of the statute, the common law or of the injunction, and this we think is clear from

the record and from our brief. The brief throughout refers to the whole record, though sometimes when a fact is proved again and again in identical terms the specific reference is to the page where it first appears.

As to the five hundred pages of additional testimony at the final hearing: Little new was adduced, and that little is fully covered by our statements. Evidence taken at the final hearing is set out on pages 576 to 1092 of the record. The first 101 pages consist of matter previously in the case, the Brotherhood introducing extracts from various pleadings and affidavits and the Railroad introducing the entire document or so much as is deemed material to a proper understanding of the extract. Nine clerks employed at Houston whose affidavits had been previously used then testified in substance as they had sworn before (R. 678-727) and in addition there was evidence that between May, 1927, and February, 1928, several officers and members of the Association had received increases in pay, one of them (A. G. Baker) having been promoted from a clerical to an official position, and thereupon ceasing to be an officer and member of that organization (R. 695-704). Armstrong then testified as shown on page 35 of our brief (R. 727-735). And so the record goes, a great mass of paper, but containing little except repetition of matters previously proved.

Included in that little is the letter of May 24, 1927, from Lull to McDonald declaring his purpose to deal with the Association if it was found fairly to represent the clerks (R. 772-774), the constitution of the Brotherhood (R. 988-1017), the trifling amounts of expenses of officers of the Association paid by the Company (Exhibits between R. pp. 1020 and 1021), the fraudulent entry of Harper into the service of the Company by

means of a false oath as to his previous record (R. 1085-1087), and the fact that at the time of the final hearing the Association had 894 members (R. 1026) and the Brotherhood *claimed* 463 (R. 966-7) on the Company's lines.

Respectfully submitted,

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April 30, 1930.